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No. 99-851

In the

Supreme Court of the United States

STEPHEN P. SUGARBAKER,

Petitioner,

versus

SSM HEALTHCARE, d/b/a ST. MARYS HEALTH CENTER .,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF

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INTRODUCTION

St. Marys[1] makes no attempt to dispute the fundamental contention in Dr. Sugarbaker's petition ("Petition") that physicians are routinely denied access to federal courts through application of an "unconventional" and "unusual" burden of proof standard of review for summary judgment.

St. Marys conspicuously fails to discuss the controlling decision of this Court, *Lavine v. Milne*, 424 U.S. 577 (1976), that a statutory rebuttable presumption (i.e., HCQIA) "carries with it no procedural consequence." *Id.* at 584.

St. Marys misapprehends the basis for the Petition and misstates the record. The Petition concerns the Eighth Circuit's realignment of the "burden of proof" to Dr. Sugarbaker under the "summary judgment standard of review." *See* App. at 11a. Dr. Sugarbaker did not at any time acquiesce in an altered burden of proof on summary judgment as St. Marys alleges. This will be shown below.

Contrary to St. Marys' suggestion, the Courts of Appeals *are* in conflict over whether the testimony of a medical expert who can prove there was no reasonable basis for a hospital's disciplinary action against a physician is irrelevant. *See* App. at 15a (holding "the affidavit of . . . an independent surgeon [regarding] the quality of Dr. Sugarbaker's care . . . is irrelevant to our objective inquiry"); *compare Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1334 n.9 (10th Cir. 1996) (explicitly rejecting the hospital's argument that a "difference of opinion among [medical] experts does not raise an issue as to the objective

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[1] Dr. Sugarbaker uses the terms defined in his Petition for a Writ of Certiorari herein. "St. Marys Brief at _" refers herein to Respondent's Brief in Opposition.

reasonableness of the inquiry"). This Court should grant certiorari to resolve the conflict. *See* S. Ct. R. 10.

STATEMENT OF THE CASE

Dr. Sugarbaker will not respond to every inaccurately portrayed fact or legal assertion made by St. Marys, but he will address or clarify a few. St. Marys' rosy picture of offering Dr. Sugarbaker the "vast majority" of his privileges while under limited "restriction" at St. Marys is absurd. *See* St. Marys Brief at 2. St. Marys' offer required Dr. Sugarbaker to fully "release" St. Marys and all the peer review participants in exchange for **one year** of conditional, restricted privileges (R. 3367). St. Marys' offer was a disguised termination for which St. Marys' own expert could "question[ ] the good faith of St. Marys" (R. 2643).

Contrary to St. Marys' suggestion, Congress determined "only professional review actions . . . eligible for immunity under [HCQIA] are those based on the **competence** or professional conduct of an individual physician." H.R. Rep. No. 99-903, 99th Cong., 2d Sess. 21 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6384, 6403-04 (emphasis added). St. Marys did not at any time find Dr. Sugarbaker to be "incompetent" or engaged in unprofessional conduct (R. 2715, 2720-22). Indeed, St. Marys admits: "[T]he peer review record [of Dr. Sugarbaker] contains evidence that, in the six cases [under review]. . . . Dr. Sugarbaker provided acceptable care" (R. 1518).

II. THE SUBSTANTIVE EVIDENTIARY STANDARDS UNDER HCQIA DID NOT IMPOSE UPON DR. SUGARBAKER THE BURDEN OF PROOF FOR SUMMARY JUDGMENT UNDER FED. R. CIV. P. 56 AND HE IS NOT ESTOPPED FROM SEEKING RELIEF IN THIS COURT.

St. Marys argues Dr. Sugarbaker "is estopped from attacking the very standard that he embraced in the District Court and the Court of Appeals." *See* St. Marys Brief at 7. St. Marys' argument is in error. Dr. Sugarbaker seeks relief from this Court due to the Eighth Circuit's shifting to Dr. Sugarbaker of the burden of proof on the "summary judgment standard of review." *See* App. at 11a.

St. Marys cites *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), for the proposition that the "determination of whether a given factual dispute requires submission to a jury must be **guided** by the substantive evidentiary standards that apply to the case." *Id.* at 255 (emphasis added). Dr. Sugarbaker agrees. But this "guide" does not impose upon the non-moving party, Dr. Sugarbaker, the burden on "summary judgment," i.e., whether there exists a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U. S. 317, 325 (1986).

Under this Court's longstanding jurisprudence, the moving party retains the burden on summary judgment and that burden is not "discharged" unless and until the moving party makes a "'showing' . . . there is an absence of evidence to support the non-moving party's case." *Id.* This rule applies equally to those issues for which the non-moving party (i.e., Dr. Sugarbaker) ultimately bears the burden of proof at trial. *Id.* ("[T]he burden on the moving party ['with respect to an issue on which the non-moving party bears the

burden of proof"] may be discharged by 'showing' . . . that there is an absence of evidence to support the non-moving party's case").

Immunity is a defense, *see Wilson v. Layne*, 526 U.S. 603, 605-606, 119 S. Ct. 1692, 1695 (1999), and thus can be waived, *see Imperial v. Suburban Hosp. Ass'n*, 37 F.3d 1026, 1030 (4th Cir. 1994). St. Marys, not Dr. Sugarbaker, filed the motion for summary judgment on its immunity defense. St. Marys, not Dr. Sugarbaker, ultimately bears the burden of proof "on summary judgment" even though "the evidentiary standards that apply to the case" impose upon Dr. Sugarbaker the burden of proof with regard to one element of HCQIA immunity.[2] The Eighth Circuit and the Courts of Appeals it follows have erred in imposing the burden of proof for summary judgment on the non-moving party (i.e., Dr. Sugarbaker).

Dr. Sugarbaker acknowledged in the District Court and the Eighth Circuit the "guide" used by the courts **in the first instance** for motions for summary judgment under HCQIA. *See* App. at 11a. Dr. Sugarbaker never acknowledged or "embraced" the view that this "guide" was dispositive of a motion for summary judgment or that the burden of proof "for summary judgment" shifted to him.

Indeed, after citing the "guide," Dr. Sugarbaker quoted to the Eighth Circuit that part of Fed. R. Civ. P. 56 that provides "[s]ummary judgment may be rendered only if .

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[2] The Eighth Circuit erred in holding Dr. Sugarbaker must show by a preponderance of the evidence that "St. Marys is not entitled to statutory immunity under the HCQIA." *See* App. at 23a. Three elements must be present for St. Marys to have statutory immunity. A [1] "professional review body" (or other protected person) [2] must take a "professional review action" [3] that "meets all the standards in Section 11112(a)." 42 U.S.C. § 11111(a)(1). Dr. Sugarbaker bears the burden of proof by a preponderance of the evidence **only** with regard to the third element shown above. *See* 42 U.S.C. § 11112(a).

. . 'there is no genuine issue as to material fact.'" *See* Brief of Appellant dated August 21, 1998 at 33. Dr. Sugarbaker explicitly argued to the Eighth Circuit that his **only** burden in opposing St. Marys' motion was to "submit evidence," not to carry St. Marys' burden of showing an absence of any genuine issue of material fact. *See* Reply Brief of Appellant dated January 21, 1999 at 5 ("Dr. Sugarbaker's burden is only to submit evidence 'such that a reasonable jury **could** return a verdict for [him].'" (emphasis in original)).

This Court will ordinarily consider a petition for certiorari challenging a lower court ruling so long as the petitioner merely "challenged [that] ruling" in the court of appeals below. *Cf. Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). This rule applies even when "[i]t is not entirely clear that appellants suggested the same interpretation in the District Court as they suggest here." *Bellotti v. Baird*, 428 U.S. 132, 143 n.10 (1976). This Court ordinarily declines to review only when the "questions [were either] not pressed or passed upon below." *See Youakim v. Miller*, 425 U.S. 231, 234 (1976).

The Petition seeks review of whether the "lower court erred in affirming summary judgment." *See* Petition at i. This issue was both "pressed" by Dr. Sugarbaker and "passed upon" by the Eighth Circuit. The decisions of this Court upon which St. Marys relies prohibit a party only from raising before this Court "factual issues" when "it has made contrary assertions in the courts below." *See Steagald v. United States*, 451 U.S. 204, 209 (1981). Dr. Sugarbaker seeks this Court's review of questions of law, not "factual issues."

Finally, St. Marys contends the "standard of review for summary judgment under the HCQIA cannot be considered . . . fundamental." *See* St. Marys Brief at 8. This contention should give the Court pause. Nothing could be

more fundamental than the standard under which the burden of proof on summary judgment is applied. *Cf. Lavine v. Milne*, 424 U.S. 577, 585 (1976) ("Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive of the outcome of the litigation . . . .").

III. THE COURTS OF APPEALS ARE IN CONFLICT AS TO WHETHER TESTIMONY FROM A PLAINTIFF'S PEER REVIEW EXPERT IS RELEVANT.

St. Marys contends that "expert testimony as to the propriety of medical care provided by [a physician] cannot rebut the HCQIA presumption." *See* St. Marys Brief at 14. This contention is not true in the Tenth Circuit. *See Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1334 (10th Cir. 1996). St. Marys argues *Brown* is not in conflict with the Eighth Circuit and other Courts of Appeals because *Brown* "turned on the second [of four] prong[s] of the [HCQIA] immunity analysis." *See* St. Marys Brief at 15. St. Marys is wrong.

First, St. Marys' argument that *Brown* "does not conflict" with other Courts of Appeals decisions, *see* St. Marys Brief at 17, is directly contrary to an argument it made to the Eighth Circuit. *See* Reply Brief of Appellant SSM Healthcare Central Region d/b/a St. Marys Health Center at 16-17 (8th Cir. Jan. 12, 1999) ("*[Brown]* conflicts with HCQIA[]").

Second, St. Marys' argument slices *Brown* much too thinly. *Brown's* holding that "the district court did [not] err in failing to find [the hospital and others] immune, as a matter of law," was unmistakably premised on the Tenth Circuit's determination that a "'difference of opinion among experts'. .

. raise[s] an issue as to the objective reasonableness" of the hospital's action. *See Brown*, 101 F.3d at 1334 n.9. Under Tenth Circuit precedent, the expert opinions offered by Dr. Sugarbaker are relevant. In the Eighth Circuit and other Courts of Appeals, they are "irrelevant." A clear conflict exists.

Under the evidentiary standards adopted by the Eighth Circuit and Courts of Appeals other than the Tenth Circuit, it is virtually impossible for a physician to avoid summary judgment. These Courts of Appeals hold that their review of the evidence is under an "objective" standard and that the "subjective" views of hospital peer reviewers are "irrelevant." *See* App. at 11a, 15a, 16a. At the same time, these courts inconsistently proclaim that **objectively** "'incorrect conclusion[s] on . . . medical issue[s]'" by hospital peer reviewers are "irrelevant." *See* App. at 15a. These conflicting standards get the aggrieved physician coming and going. A competent physician, who can prove his competence but is the victim of unlawful action by a hospital's peer review procedures, cannot overcome summary judgment and otherwise has no legal recourse under the evidentiary standards adopted by the Eighth Circuit and other Courts of Appeals. Only the Tenth Circuit applies a rule in accord with Congress' intent under HCQIA.

CONCLUSION

The law abhors privileges and none more so than immunity. Congress refused to grant broad immunity to hospitals under HCQIA, granting instead only a presumption that could be overcome by a mere preponderance of the evidence. The Eighth Circuit and other Courts of Appeals have imposed an "unconventional" and "unusual" burden of proof "on [the] summary judgment standard of review" to uniformly deny physicians access to federal court. The

Courts of Appeal (except the Tenth Circuit) also have declared relevant evidence of a physician's competence—the sole interest of HCQIA—to be "irrelevant" to their analysis. This Court should grant the Petition.

Respectfully Submitted,

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